

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs September 24, 2008

**BENNY RAY MITCHELL v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Cocke County**  
**No. 30,566-I Ben W. Hooper, II, Judge**

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**No. E2008-00088-CCA-R3-PC - Filed January 8, 2009**

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Petitioner, Benny Ray Mitchell, appeals the post-conviction court's denial of post-conviction relief. On appeal, Petitioner argues that the trial court improperly denied post-conviction relief because he received ineffective assistance of counsel at trial. We determine that the post-conviction court's denial of the petition was proper because Petitioner failed to prove that he received ineffective assistance of counsel. Consequently, the judgment of the post-conviction court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and DAVID H. WELLES, J., joined.

J. Derreck Whitson, Newport, Tennessee, for the appellant, Benny Ray Mitchell.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Al Schmutzer, Jr., District Attorney General and Amanda Inman, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

Petitioner was convicted by a jury of theft of property valued over \$10,000 and for operation of a chop shop. *State v. Benny Ray Mitchell*, No. E2005-01896-CCA-R3-CD, 2006 WL 2633032, at \*1 (Tenn. Crim. App., at Knoxville, Sept. 14, 2006). As a result, he was sentenced as a persistent offender to twelve years for the theft conviction and ten years for the conviction for operation of a chop shop. The trial court ordered the sentences to run consecutively. *Id.* On appeal, this Court summarized the facts underlying Petitioner's convictions as follows:

Frank Jackson Patton, Jr. testified that he and his wife visited the Newport area on October 30th and 31st of 2004, and they stayed at a motel in Newport. At the time, Patton drove a 2003 diesel Chevrolet Silverado, model 2500HD, with four doors and four-wheel drive that he had bought for \$46,683 six months prior to this incident.

Patton said that the truck had approximately 5,600 miles on it, and it had a canopy on the back of the truck that contained tools and Christmas presents that he had recently purchased. He estimated that the value of the tools and the presents was \$6,100, and the value of the truck was over \$10,000. Patton described how his truck came equipped with OnStar, which is a device that can track a stolen vehicle by satellite.

Patton testified that, when he awoke at the motel on the morning of November 1, 2004, his truck was gone. He said that he called the local police department, and officers came to take an incident report. Patton said that he did not see his truck again until he was contacted by Detective Carroll and told to come identify his truck, which he did. He said that he was able to identify his truck and some personal items that were in the truck. When Patton saw the truck, he noticed that the hood had been removed, the headlights had been partially removed, and the air cleaner had been loosened and lifted up. On cross-examination, Patton admitted that he did not see who had taken his truck, and he did not see the Defendant take his truck.

Roger Henderson testified that his niece is married to the Defendant and that he and the Defendant have never gotten along very well, so he avoids the Defendant. He said that he owns a heat and air and appliance service, and he is also a reserve deputy with Cocke County Sheriff's Department, which means that he is a volunteer who rides with other officers and helps them. Henderson recalled that he was riding with Officer Frank Petrey [FN1. The record reflects that Officer Frank Petrey had regrettably passed away prior to this trial rendering him unavailable to testify.] on November 1, 2004, when they got a call on the police radio about someone trying to steal a truck in the Bridgeport area. The two proceeded to the address given by the dispatcher, and they went between the house and a little "makeshift" garage building. There, about 100 feet away from the garage Henderson saw the Defendant and another man named Kevin Ball walking through the grass toward the interstate. Officer Petrey activated the blue lights of the police cruiser, and Henderson called to the Defendant and Ball, who both walked back to the cruiser.

After the Defendant and Ball walked back to the cruiser, Officer Petrey and Henderson placed them in handcuffs, and Henderson stayed with the handcuffed men while the officer went to look in the garage. Henderson said that, when the officer returned, he told Henderson that there was a new truck in the garage that was being stripped. The officer then placed the men under arrest. Henderson then identified pictures of the truck that was in the garage being stripped. In the garage, he also saw "chain horses," which are designed to lift heavy weights such as engines. Henderson also saw a camper top in one corner of the garage and an OnStar device lying in the garage in a pile of leaves and papers that looked like they had been burned.

John Carroll, a detective with the Cocke County Sheriff's Department who specializes in auto theft investigation, testified that he was involved in the investigation of the theft of the Patton's [sic] truck. Detective Carroll testified that he received a call from his dispatch office saying that OnStar had contacted the office because OnStar had received a signal from the OnStar device in the Patton's [sic] truck. The detective was unable to immediately respond, but he contacted OnStar and told them to call him if the truck moved. Then, Detective Carroll called Officer Petrey and told him to go to the address given by OnStar and that he would find the truck there. Detective Carroll later went to that address, and he saw what appeared to be a chop shop. He also saw the OnStar device and the circuit board, which is supposed to be hidden inside the truck, in a pile that appeared to have been burned.

At the chop shop, the detective saw numerous parts as well as vehicles that were identifiable as stolen, including a water meter truck, a race car, a Chevrolet truck, and a four-wheeler. Because of this, the detective filed a forfeiture proceeding that resulted in any parts and cars that were unclaimed being sold. He said that the Defendant never claimed any of these parts or vehicles. In addition to the stolen parts and stolen vehicles, the detective saw tools that were used in the furtherance of the chop shop. Detective Carroll testified that he seized the truck as part of the investigation, and he asked Patton to come and identify the truck. The detective learned that the residence where the truck was found was being rented to Curtis Reed. [FN2. We note that this portion of the record indicates that Curtis Reed's name is Curtis Cob Reed. Curtis Reed later testified that his name is Curtis Gene Reed, and we will therefore refer to him as Curtis Gene Reed.]

On cross-examination, the detective said that, at the time of this investigation, Curtis Gene Reed lived at the address where the chop shop was located, and Reed had pled guilty to operating the chop shop. He also testified that he did not check for any fingerprints on any of the cars. Detective Carroll said that there were various hand tools scattered in the structure, including ratchets and wrenches and "various things used to disassemble a vehicle." The detective said that he never personally saw the Defendant at the garage.

Curtis Gene Reed testified that he is currently incarcerated and serving a sentence for theft and operating a chop shop at a house that he was renting, charges to which he pled guilty. Reed testified that there were two men besides him involved in this operation, the Defendant and Kevin Ball. Reed testified that the Defendant had the 2003 Chevrolet truck involved in this case for four days, and Reed told him that he did not want the Defendant to bring the truck to his house because he knew that it was equipped with OnStar. Reed said that less than an hour after the Defendant brought the truck to his house the police arrived looking for the truck. Reed testified that the Defendant came to him and wanted him to take the truck apart, strip the parts, and sell the parts to make extra money. Reed said that he and the

Defendant have taken parts of stolen cars before, and he saw the Defendant drive the 2003 Chevrolet truck to his garage. Reed estimated that if the truck had been stripped, the parts would have brought \$3,000.

On cross-examination, Reed testified that he pled guilty to operating a chop shop and received seven years. Reed said that he saw the Defendant drive the truck to Reed's house on a Saturday, and Reed stayed at his house only a few minutes after the truck arrived.

*Id.* at \*1-3.

After this Court affirmed Petitioner's convictions, he filed a timely pro se petition for post-conviction relief. The post-conviction court entered an order in which it found that the petition for post-conviction relief presented a "colorable claim." The post-conviction court appointed counsel to represent Petitioner, and an amended petition was filed on May 17, 2007. In the amended petition for post-conviction relief, Petitioner alleged the following: (1) that trial counsel failed to subpoena witnesses to testify that would have exonerated Petitioner; and (2) that the testimony of the uncalled witnesses for Petitioner would tend to lessen the credibility of the State's case and result in a not guilty verdict. The trial court set the matter for a hearing.

#### *Evidence at the Post-conviction Hearing*

At the post-conviction hearing, trial counsel for Petitioner testified that he represented Petitioner at the trial where he was convicted of theft of property over \$10,000 and operation of a chop shop. Trial counsel testified that his strategy was to show at trial that Petitioner's mere presence at a chop shop where a stolen truck was discovered was not in and of itself enough to prove his guilt. Petitioner maintained his innocence throughout the trial. Trial counsel did not feel that the State had adequately proved its case but acknowledged that the jury disagreed when it found Petitioner guilty as charged.

Trial counsel could not recall whether he and Petitioner discussed co-defendant Kevin Ball prior to trial. Trial counsel did, however, remember that Mr. Ball and Petitioner's wife, Becky Mitchell, met with him at his office about one year after Petitioner's conviction. During that meeting, Mr. Ball claimed that Petitioner was not guilty. Mr. Ball signed an affidavit to that effect. In spite of the affidavit, trial counsel opined that Mr. Ball's testimony, had it been available at trial, would not have "changed the outcome one lick."

Trial counsel stated that he and Petitioner made a joint decision not to call Petitioner's wife as a witness at trial. They discussed the fact that a jury might look at her testimony as biased. Further, trial counsel did not feel that the State had proved its case at that point. In other words, trial counsel did not feel that Mrs. Mitchell's testimony would be effective.

After Petitioner was convicted, trial counsel remembered filing a motion for new trial. The affidavit signed by Mr. Ball was not addressed in the motion for new trial because it had not yet been provided. There was no amended motion for new trial filed after the submission of the affidavit.

Petitioner testified at the hearing. He claimed that he and his wife discussed the possibility of using Mr. Ball as a witness with trial counsel prior to trial. Petitioner's memory was that trial counsel insisted that Mr. Ball was a witness for the State so he would not be called as a defense witness. Petitioner maintained that he was at the chop shop to borrow tools to fix his wife's "Cavalier." Petitioner insisted that he was just in the wrong place at the wrong time.

Rebecca Mitchell, the Petitioner's wife testified that she had attended the majority of the pre-trial meetings between trial counsel and Petitioner. Mrs. Mitchell specifically recalled an instance prior to trial in which the three discussed calling Mr. Ball as a witness for the defense. Mrs. Mitchell remembered that trial counsel decided not to call Mr. Ball when he discovered that he was a witness for the State. After Petitioner was convicted Mrs. Mitchell went to trial counsel's office accompanied by Mr. Ball.

Kevin Ball testified at the post-conviction hearing. He testified that Petitioner was not involved in stealing the truck or operating the chop shop. Mr. Ball recalled meeting at the office of trial counsel with Mrs. Mitchell to sign an affidavit to that effect. Mr. Ball claimed that he was not contacted by trial counsel prior to trial despite the fact that he had advised one of the detectives involved in the case that he would testify for Petitioner at trial.

After the hearing, the post-conviction court entered an order denying post-conviction relief. The post-conviction court determined that ineffective assistance of counsel was the "only valid issue" presented at the hearing. Further, the post-conviction court determined that trial counsel was not ineffective "in any part of his representation" and that the "failure to call a witness did not constitute ineffective assistance of counsel but was part of [trial counsel's] trial strategy.

#### *Analysis* *Post-conviction Standard of Review*

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issue raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not re-weigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

On appeal, Petitioner argues that the post-conviction court erred in denying his petition because he received ineffective assistance of counsel. Specifically, on appeal, Petitioner argues that trial counsel failed to contact a possible witness and did not pursue a motion for new trial after receiving the newly-discovered evidence.

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing by clear and convincing evidence that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996); *see also* T.C.A. § 40-30-110(f). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below “the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). “Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim.” *Henley*, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court’s factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court’s findings. *See id.* at 578. However, our supreme court has “determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo” with no presumption of correctness. *State v. Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, Petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This Court may not second-guess a reasonably based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Petitioner contends that trial counsel was ineffective for failing to thoroughly investigate and contact Mr. Ball as a witness. Trial counsel’s testimony, which was implicitly accredited by the post-conviction court, indicated that he did not know prior to trial that Mr. Ball could potentially help Petitioner’s case. Instead, it appears that trial counsel only became aware of Mr. Ball’s willingness to testify on Petitioner’s behalf after Petitioner was convicted of the offenses. Regardless of the timing, trial counsel testified at the post-conviction hearing that he did not think that Mr. Ball’s testimony would have “changed the outcome one lick.” Further, Petitioner himself testified that his attorney told him it “wouldn’t be a good idea” to call Mr. Ball as a witness. Petitioner has failed to establish by clear and convincing evidence that there is a reasonable probability that Mr. Ball’s testimony would have changed the result of Petitioner’s trial.

Petitioner next argues that trial counsel was ineffective for failing to pursue an amended motion for new trial after Mr. Ball executed an affidavit in which he claimed that Petitioner had no involvement in the theft or operation of the chop shop. This is essentially the same argument that Petitioner made with regard to calling Mr. Ball as a witness at trial. Again, trial counsel did not think that the addition of Mr. Ball's testimony would have changed the outcome of the trial and Petitioner's attorney told him that he did not think that it would be a good idea to call Mr. Ball as a witness. Again, Petitioner has not proven by clear and convincing evidence that he is entitled to post-conviction relief on the basis of ineffective assistance of counsel or that he was prejudiced by trial counsel's alleged deficiencies. Petitioner is not entitled to relief on these issues.

### *Conclusion*

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE